No. 3863

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHINA MAIL STEAMSHIP COMPANY, LIMITED, a Corporation, Owner and Claimant of the Steamship "NANKING", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

APPELLANT,

VS.

THE UNITED STATES OF AMERICA,

APPELLEE.

BRIEF FOR APPELLANT

Upon Appeal from the United States District Court for the Territory of Hawaii.

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F. D. MONCKTON, Clerk.

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SUBJECT INDEX

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STATEMENT OF THE CASE

In this case the United States, by the District Attorney, filed its libel on July 2nd, 1921, in admiralty in the United States District Court for the Territory of Hawaii, to subject the steamship "Nanking", under four separate counts, to penalties aggregating $4000.00 under the provisions of Section 10 of Chapter 29 of the Immigration Act of Feb. 5, 1917, (Sec. 4289-1/4 ee 1919 Supp. U. S. Comp. Statutes—39 Stat. 881) on account of the landing of four Chinese named as Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam, at Honolulu, on February 1st or 2nd, 1921, from

the said ship, which time and place had not been designated for the said landing by the immigration officers, and asked a decree for the amount of the penalty, that is $1000.00 for each alien. The libel also alleged in each count that "in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of said steamship "Nanking" for the "unlawful landing" of the alien. (Record, p. 4.)

The China Mail Steamship Company, Limited, as owner and claimant of the vessel, filed its answer admitting that these aliens did land in the United States, at Honolulu, without having actually been prevented therefrom by the owners, officers, and agents of the said "Nanking", but denying that they unlawfully permitted such landing (Record, 21), and setting up, in defense, that these men escaped from the vessel notwithstanding the taking of every reasonable and proper precaution to prevent any alien passengers from landing and that no alien or Chinese did in fact leave the vessel except over the gangway and then only upon exhibiting proper passes issued by the United States Inspector of Immigration. The fraudulent use of passes is also alleged, as well as the issue of such passes or permits for more than one person whereby any number of persons less than the whole number of persons stated therein could go on board on the pass and the full number come off—a condition which rendered it impossible for the steamship company to prevent a possible illegal landing. (Record, pp. 22-24.) The answer also alleges that the said Section is unconstitutional in so far as it imposes a penalty in spite of every effort to prevent the inhibited landing. (Record, p. 24.) The answer required the libellant to prove the allegation of the libel that in the opinion of the Secre-

tary of Labor it was impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent of the vessel. (Record, p. 21.)

The Libellant filed exceptions to the answer which, in effect, amount to the claim that inasmuch as the actual landing of these aliens was admitted, nothing else is material, and none of the matters set up in the answer constitute a defense. (Record, pp. 27-28.)

The case was tried as one in admiralty, and Court held Section 10 to be constitutional, and sustained the exception, holding that the answer did not contain a meritorious defense for the reason that under the act referred to the duty to prevent such aliens from landing at any place other than that designated by the immigration officials is made absolute, and that the various changes in the statute on the subject indicate that Congress intended to make such duty absolute. (Record, pp. 33-34.)

The Libellee elected not to amend its answer, and the court by decree assessed a penalty against the vessel in the sum of $4000. (Record, p. 35.)

Section 10 of Chapter 29 of the Immigration Act of Feb. 5th, 1917, under which this suit was instituted, reads as follows:

"Sec. That it shall be the duty of every person, including owners, officers, and agents of vessels or transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section twenty-three of this Act, bringing an alien to, or providing a means for an alien to come to, any seaport or land border port of the United States, to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the failure of such person, owner, officer, or agent to comply with

the foregoing requirements shall be deemed a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than $200 nor more than $1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, a penalty of $1000 shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States Court."

ERRORS RELIED UPON

The following errors have been assigned (Record, pp. 40-47), and are now relied upon as reasons why the decree in this case should be set aside.

1

The Court erred in its decision that by virtue of the provisions of Section 10 of the Act of Congress of the United States approved February 5, 1917, entitled "An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," it was and is the absolute duty of every person, including owners, officers, and agents of vessels bringing any alien to any seaport of the United States to prevent under all circumstances the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and that the penalties of said section will apply if any such alien has in fact effected an escape from such vessel without the knowledge or consent of the owner, officers, master or agents thereof and notwithstanding such owner, officers, master and agents may have exercised due diligence and taken

every reasonable and proper precaution to prevent such unauthorized landing, and notwithstanding such escape may have been effected by means beyond the reasonable power of the said owners, officers, master and agents of the vessel to have anticipated and prevented.

2

The Court erred in its decision that, by virtue of said section 10, it was the absolute duty of the owner, officers and agents of the said steamship "Nanking" to have prevented the aliens named in the libel herein, to-wit, Jesus Wong, Manuel Chan, Ramon Chon and Joaquin Lam, and each of them, from landing at the port of Honolulu, when it affirmatively appears by paragraph VII of the answer of the claimant herein that the said aliens in fact effected an escape from said vessel against the will and intent of the owner, officers and agents of said vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said aliens from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any alien passengers from leaving said vessel, and that none did in fact leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigration at Honolulu, and that no alien did in fact leave said vessel over said gangway without exhibiting such pass, and notwithstanding the claimant has by its answer to said libel alleged and offered to prove that the said escapes were effected by the fraudulent and

improper use of passes theretofore regularly issued by the United States Inspector of Immigration at Honolulu in the manner in said answer set forth.

3

The Court erred in sustaining exception Number 3 taken and filed to claimant's answer and holding that the matters and things alleged in paragraph VII of claimant's answer as above set forth do not state a defense to said libel.

(The matters alleged in paragraph VII of claimant's answer, herein referred to, are quoted as follows:

"That the said four alien passengers escaped from the said vessel against the will and intent of the owner, officers and agents of the vessel, and that neither the master or any other officer or agent of said vessel nor the owner thereof either knowingly or negligently permitted the landing of said alien Chinese from said vessel, and that every reasonable and proper precaution was taken and exercised by the master and other officers and the owner of said vessel to prevent any passengers on said vessel from leaving said vessel, and none in fact did leave or escape from said vessel except over the regular gangway to the dock, which gangway was well guarded by the master and agents of said vessel to prevent any and all aliens from leaving said vessel without exhibiting proper passes issued by the Inspector of Immigation at Honolulu, and that no alien or Chinese passengers did in fact leave said vessel over said gangway without exhibiting such pass; and claimant is informed and believes and therefore alleges and proposes to prove in this cause, that the said escapes were effected by the fraudulent use of passes theretofore regularly and properly issued by the United States Inspector of Immigration at said Honolulu, and ap-

proved by Castle & Cooke, Limited (the then agents for said steamship company), to Chinese residents of Honolulu having lawful business on the vessels of said steamship company, which fraudulent use consisted in one or more of said passes (either with or without the connivance of the legitimate holders thereof therein named) having been given to one or more persons holding his or their own proper pass or passes, who took such other passes on board the vessel and there gave such other passes to the several Chinese who escaped, thereby enabling said escaping Chinese to use said passes as though their own, by falsely impersonating the person named in such pass, with the aid of wearing some article or articles of wearing apparel theretofore surreptitiously furnished to them by conniving friends or agents and bearing some mark denoting the origin or purchase thereof in Honolulu, thereby passing the Immigration Inspectors and guards and the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in a manner beyond the power of said steamship company to have anticipated and prevented; and also, as claimant is informed and believes, and proposes to prove in this cause, passes or permits were occasionally made out by the Inspector of Immigration at Honolulu for more than one person for Chinese of Honolulu desiring to visit on board vessels in port and it would therefore be possible and easily practicable for such passes to be used by one or more persons less than the whole number of persons mentioned therein in boarding any vessel and then used to pass from the ship by the full number of persons therein mentioned; and that on February 1, 1921, while said steamship "Nanking" was in port at Honolulu, Chinese visiting them from Honolulu did board said vessel, over the regular gang-

way with passes issued by said Immigration Inspector, and, while claimant cannot allege or prove with certainty that any such double passes were in fact then used, claimant nevertheless alleges that the existence of such a situation would render possible the illegal landing of alien passengers, notwithstanding all efforts of the steamship company to prevent the same.")

4

The Court erred in its refusal to find and hold that in so far as the said section 10 purports to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.

5

The Court erred in holding that the answer of the claimant fails to disclose a meritorious defense to said libel.

6

The Court erred in sustaining exception number 4 taken and filed to claimant's answer.

(Exception 4, here referred to, is quoted as follows:

"4. That the allegations of Article VIII of said answer are wholly insufficient and state no facts upon which to base and sustain the claim that Section 10, Chapter 29, of the Act of February 5, 1917, is illegal

and unconstitutional, and that the allegations of said Article VIII state only the conclusion of the pleader."

Article VIII of claimant's answer, so referred to in libellant's exception 4, is quoted as follows:

"That in so far as section 10 of Chapter 29 of the Act of February 5, 1917, relating to Immigration assumes or may be construed to make punishable as an offense any failure of the owners, officers or agents of any vessel to prevent the landing of an alien in the United States at any time or place other than as designated by the Immigration officers, notwithstanding the exercise by them of all due and reasonable care and efforts to prevent such landing, notwithstanding circumstances beyond the reasonable power of the owner, officers, master or agents of the vessel to foresee and prevent, and without any negligence or any knowledge thereof, the same is unreasonable, harsh and oppressive, and is illegal and unconstitutional.")

7

The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, that the said vessel "Nanking," her engines, boilers, machinery, tackle, apparel and furniture, are liable to a penalty in the sum of four thousand dollars, or any penalty, to be paid to the libellant, and that the libellant do have and recover from said libellee, the steamship "Nanking", her engines, etc., the said sum, or any sum.

8

The Court erred in having made and entered the decree in said cause on the 17th day of November, 1921, decreeing that the libellant, United States of America, do have and recover from said libellee, the steamship "Nanking," her engines, boilers, machinery,

tackle, apparel and furniture the sum of four thousand dollars, in that said sum so decreed is excessive, and the amount thereof is not warranted by the facts as set forth in the pleadings.

19

The Court erred in rendering and entering said decree without having required the libellant to prove the allegations set forth in paragraph 6 of each of the several counts of said libel, that in the opinion of the Secretary of Labor it was or is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of said vessel for the alleged violation of said section 10.

20

The Court erred in rendering and entering said decree without having required the libellant to prove, in each of the four cases set forth in the separate counts of said libel, that it was in fact impracticable and inconvenient to prosecute the person, owner, master, officer or agent of said vessel for the alleged violation of said section 10.

ARGUMENT

There are several principal points or principles contended for by the appellant.

FIRST: Looking at Section 10 of the Immigration Act of February 5, 1917, from the Government's standpoint that it controls the case in hand, it is contended:

(1) That Section 10 should not be taken as imposing *an absolute duty,* in any event,—figuratively "though the heavens fall",—to prevent an alien from escaping from a vessel, and, on an escape, as imposing a penalty notwithstanding every effort made and all

due diligence exercised to prevent it, even in the face of conditions which were created by the Immigration officials themselves, and which were sufficient to defeat and render ineffectual the efforts so made by the vessel to carry out the law.

(2) That if Section 10 must be regarded as imposing such an absolute duty, despite earnest efforts to comply with its terms, and a penalty imposed if an alien then escapes and gets ashore, it is unconstitutional.

SECOND: The case of the libellant was not made out, inasmuch as any right to sue civilly under Section 10 was dependent upon a showing that it was for some reason impracticable and inconvenient for the Government to prosecute the person, owner, master, officer or agent of the vessel, or at least upon some evidence to support the allegation of the libel that "in the opinion" of the Secretary of Labor it was impracticable and inconvenient so to do,—this allegation not being among those admitted by the libellee and proof thereof being called for by its answer, and nothing having been offered to show that the Secretary of Labor ever entertained or expressed any opinion whatever.

THIRD: The fines imposed aggregating $4000. were grossly excessive, in contravention of our Constitution.

FOURTH: That aside from all of the foregoing considerations, the decision cannot be supported for the entirely separate reason that the Immigration Act of February 5, 1917, of which Section 10 is a part, does not apply to this case, because the offense comes under the Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. L. 58, and its amendments), for which reason the court had no jurisdiction to entertain a suit under section 10 in this case.

Discussing the foregoing points seriatim:

FIRST: As to the issue of "absolute duty" to prevent a landing:

It is recognized that Section 10 of the Act of February 5, 1917, has taken the place of Sec. 18 of the Act of February 20, 1907, in which, on the same subject, the word "failure" was preceded by the word "neglect", so that it provided:

"It shall be the duty of the owners, officer, or agents of any vessel * * * to prevent the landing of such alien * * * at any time or place other than as designated by the immigration officers, and the *negligent failure* of any such owner, officer or agent to comply with the foregoing requirements shall be deemed a misdemeanor."

But, before discussing the law, we wish to indicate the facts, as set up in claimant's answer and which, on the issue presented by the exceptions to the answer, the court will assume to be true.

The matters set up in the present case, as a defense on the merits, have already been set out on pages 8 to 10 of this brief under the statement of error No. 3, and twice in the printed record, i.e.—on pages 22-24 in claimant's answer, and again as quoted at length in the judge's decision on pages 30-32. This defense, which claimant has offered to prove, was, in effect:

(a) That these four men *escaped* against the will and intent of the owner, master, etc., of the vessel;

(b) That their landing at Honolulu was not knowingly or negligently permitted;

(c) That every reasonable and proper precaution was taken whereby no passengers in fact left or escaped from the vessel unless by passing over the regular gangway to the dock, which was well guarded by the vessel to prevent all aliens leaving the vessel *except* on "proper passes issued by the Inspector of Immigration

at Honolulu" and that "no alien or Chinese passenger did *in fact* leave said vessel over said gangway without exhibiting such pass";

(d) That a pass system existed in Honolulu under which it was possible for Immigration Office passes, regularly issued to Chinese residents, to be fraudulently used, by being sent on board by another pass holder and then used, coupled with false impersonation and disguise, to pass their apparently proper holders out of the vessel *"thereby passing the Immigration Inspectors and guards and* the guards furnished by said vessel at the gangway of the vessel as Honolulu residents and in a manner beyond the power of said Steamship Company to have anticipated and prevented";

(e) That the Inspector of Immigration occasionally issued passes for more than one Chinese person—(may we say here, "Ching Lee and party of three" for example), so that one or two could go on board, and two or three or four come off,—this being a *condition* asserted and proposed to be proved in defense, though proof that these escapes were actually accomplished by the use of such double passes may not be obtainable.

And here we wish to make it clear that the answer leaves no room for any query of why, if the pass system were subject to such abuses, could it not have been avoided by care in that regard? It cannot be inferred that the abuses were known at the time. Had they been known it is conceded they might have been looked for and perhaps prevented. We say perhaps, even here, for it would be hard to hold the steamship responsible for a condition created and maintained by the Immigration office. But the answer unqualifiedly states that the fraudulent use of passes was done "in a manner beyond the power of said steamship company to have anticipated and prevented" (Record, p. 23), which

sufficiently negatives any idea of knowledge at the time that such a scheme was being worked. Were any new cases of the kind to occur, there would be room for question, on the fact of knowledge of such possible escapes by that method, whether any further escapes might not be anticipated and prevented.

We have not only an affirmative showing of an escape in spite of all vigilance of the vessel's people to prevent it, but a showing also of a condition created by the Government itself in the matter of passes which opened and maintained an avenue which the vessel's people could not well have closed, and which having been open, in all probability was used by the Chinese who escaped.

The argument of absolute liability would make this all immaterial; it would mean that *if* an alien escapes, no matter how or under what conditions, though the own fault of the immigration officers, the owner, master, agent, (etc.) of the vessel are all criminally liable and subject to imprisonment, and the vessel civilly liable to seizure and sale; and though a master might himself be beaten into insensibility while trying to prevent an escape, he would remain liable to punishment even by imprisonment,—for the law says so. It is no answer to say that such a punishment in such a case would never be inflicted. It *could* be, if the absolute duty exists. If, by judicial clemency, only the least possible fine were imposed, would the principle be different? Either would be punishment,—right or wrong *in principle.* And then, on like facts as to efforts to keep the law, without success, the same theory of absolute duty would, on a mere "opinion", so change the case as to *require* the *heaviest* fine against the vessel.

Except for the "Coamo" case, hereinafter mentioned, we have been unable to find any decision directly under

the present Section 10. The case of *Hackfeld* v. *United States,* 197 U. S. 442, 49 L. Ed. 826, involved a construction of the word "neglect" as used in Section 10 of the Act of March 3, 1891 (26 Stat. at L. 1084, ch. 551), where the provision was that if any master, agent, etc., "shall refuse to receive back on board the vessel such aliens" (destined for deportation) "or shall *neglect* to detain them thereon, or shall *refuse or neglect* to return them to the port from which they came" (etc.). The lower court had found the vessel owner guilty of having "refused and neglected" to return two Japanese immigrants, ordered deported, but who escaped. There, the government contended that the statute imposed "the absolute duty" of returning the immigrants, and that the word "neglect" was equivalent to "fail" or "omit", and the return was required at all hazards. The court regarded the word "neglect", as used, as capable on the one hand of meaning a failure or omission through carelessness or disregard,—"a want of such attention to the nature and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns,"—and also as equivalent to "fail" or "omit,"—depending upon the connection in which it is used. Treating it as a highly penal statute the former meaning was adopted as applicable, on the assumption that if it were intended to make the owner or master "an insurer of the absolute return of the immigrant, at all hazards, except when excused by *vis major,* or inevitable accident", Congress "would have affixed the penalty in cases wherein the owner or master *omitted* or *failed* to safely return the immigrant illegally brought here, or provided some punishment for the person who had so far complied with the terms of the statute as to receive the immigrant on board his vessel but had *permitted* the escape, either with or without fault on his part."

We realize that this tends toward the view that the amendment of Section 10, by dropping out of the word "negligent" from the couplet "negligent failure", leaving "failure" alone referring back to the duty "to prevent", Congress did thereby intend to make the duty absolute. But nowhere has it been decided that such an *absolute* duty would exist *at all hazards* or that such a statute would be valid to apply the penalty in the face of circumstances which we submit place the present case on a par with the exception indicated in the Hackfeld case where the words "at all hazards" would have to be qualified by the words "except when excused by *vis major,* or inevitable accident." And if the conditions in this case were such, caused by the immigration officials themselves, that, on the facts of the answer, they afforded the only channel for the escape of the men from the vessel, then the escape was, equally as *vis major,* beyond the vessel's power to have prevented. We submit that the *facts cannot* be disregarded in such a case as this.

Take the same law as contained in Sec. 18 of the Act of March 3, 1903 (32 Stat. L. ch. 1012), where, although it first prescribed a duty "to adopt due precautions to prevent" the landing of an alien, the further provision was, "and any such owner . . . who *shall land or permit to land* any alien at any time or place other than that designated by the immigration officer, shall be deemed guilty" (etc.). In the case of *Frank Waterhouse & Co.* v. *United States,* 159 Fed. 876, the defendants were charged with a violation of the separate section as to "refusal or neglect" to return an alien to be deported, but the court quoted Section 18 as bearing on the point of whether the "refusal or neglect" to return a man ordered deported would be

proved if a landing contrary to Section 18 were shown, and held that, as to Section 18, "the evidence did not tend in any degree to show that the master or any other officer of the vessel . . . *permitted* or in any way connived at Schmitz's desertion." There an alien seaman had deserted. The words "who *shall land* or permit to land" are in meaning the same as "fail to prevent."

If the duty to prevent landing were absolute, to what would it lead?

We find it said, in *Hackfeld* v. *United States,* 197 U. S. 442, 49 L. ed. 826, 831, that if the duty were absolute, at all hazards, the steamship companies "would doubtless claim the right to use all the force necessary to avoid the penalty"; and it would be difficult to see how it could be done "without such confinement or imprisonment as may result in great hardship to that class of individuals who may themselves have no intention to violate any law of this country." We add that it is inconceivable that Congress could pass a law which would practically compel vessel owners to imprison *or even chain up all aliens* on the vessels, on arrival at every American port, until permitted by the immigration authorities to land, regardless of class, sex, age or any other conditions, *on penalty* of being held to criminal liability for failure *if but one* escapes. The vessel would be subject, we think, to staggering liability to those so treated without justification of probable cause,—which *couldn't* be shown in ninety-nine cases out of a hundred. Let it be so held, and we need little more, added to the myriad of burdens and liabilities of vessel owners under the American flag, to drive our ships out of business. It would be too perilous to subject the enterprise to the Scylla on the one hand of fines and penalties (and possible imprisonment) when aliens escape in spite of all just precautions, and the

Charybdis on the other of possible bankruptcy from damage suits by passengers whose legal rights would be infringed by such gross abuse of their liberty.

The United States Government is progressing toward a heavy repression of foreign commerce by the growing practice of penalizing vessels and owners and masters for things they themselves strive unceasingly and honestly to prevent in the way of unauthorized landing of aliens and proscribed commodities. A sane constitutional interpretation and administration of law will help the situation. As it is, this case now before the Court shows how co-operation by vessel owners in all good effort to keep the law can be penalized, and we submit that it *would* be penalized in this case if this decision stands.

It is submitted that the errors assigned as Nos. 1 to 7, both inclusive, are well founded, and the decision should be set aside.

SECOND: The fines were not legally imposed, because the essential condition precedent to the filing of any suit *in rem* was not shown. The provision for a lien on the vessel for a penalty of $1000. is new, and it is alternate to the criminal side of the section. This statute says that on its one side is an offense, criminal in its nature, punishable by fine or imprisonment, for which the fine may be as severe as $1000. or as low as $200. Will it be held that it vests in the Secretary of Labor the power, by a mere mental conception of his own as to what constitutes convenience or practicability, to cut off all degrees of punishment and require the maximum fine against the vessel,—*whatever* extenuating circumstances there may have been which, in the criminal proceeding might in common justice cry aloud, with success, for the minimum fine?

The libel alleges, in paragraph 6 of each count,

"That in the opinion of the Secretary of Labor of the United States it is impracticable and inconvenient to criminally prosecute the person, owner, master, officer or agent" (etc.). The answer calls upon the libellant to prove that allegation (Record, p. 21). It was *not* proved in this case. Unquestionably the statute makes the civil remedy of a $1000. fine as a lien on the vessel entirely dependent upon the *alternate* stated. Otherwise the civil remedy would be unauthorized. Is that alternate dependent upon *facts* as to impracticability or upon an *opinion* on that subject? Practicability means practicability on the facts. It would imply, at least, that the Secretary would consider and determine the matter in a practical and not a merely arbitrary way,—precisely as discretion lodged in a court means judicial discretion,—and while the matter *ought* to depend upon such things as whether or not the vessel was a "tramp" or made regular recurring calls at a local port convenient for access, etc., and whether or not the owner resided conveniently near, or there were an agent in reach, or something that would give at least a little color for or against a reasonable supposition that the vessel itself might be the only means of security for a fine and should be held safely from escape, we may assume that the decision of the Secretary on the question would not be open to question.

The word "opinion" as here used, should not be interpreted in a light or arbitrary sense, nor should the "opinion" be arrived at in a whimsical manner, nor just because the government might assume the ship would have no defense and the person would. The Secretary should have the facts before him and arrive at his opinion in a judicial manner. Among other definitions, Webster's New International states that "opinion" is "settled judgment in regard to any point, * * * a notion or conviction founded on probable evidence."

In the instant case it is to be noted that the government in its said allegation does not follow the statute but alleges that it is impracticable and inconvenient to "criminally" prosecute. Does it mean that it is impracticable or inconvenient to prosecute the person, or that it is impracticable or inconvenient *to secure a conviction?* Every trial of every kind is probably an inconvenience in some manner but certainly it is not with any such thought that Congress used the word.

But, if we regard the statute as making the alternate proceeding against the vessel depend, not on the *fact* of impracticability or inconvenience, but on the mere *opinion* of the Secretary,—whatever the facts or the reasonableness thereof,—then, doubtless, his opinion alone would be sufficient to establish the Government's right to proceed on the civil side of this statute.

But are we to suppose that even that opinion does not have to be shown as having been entertained and manifested in some way capable of proof? Is the civil action, so conditioned, to lie, and judgment be had, on an *unproved* opinion?

In the case of *Waterhouse Co.* v. *United States,* 159 Fed. 876, 879, the complaint included an allegation "that the Secretary of Commerce and Labor had ordered, directed and decided" that an alien was not entitled to land and should be deported. No evidence was offered to sustain this allegation except a statement by a witness that "after the arrest of this alien on the warrant of the Secretary of Commerce and Labor, * * * a written notice was served upon the ship's officers, and * * * * upon Frank Waterhouse & Co." (the vessel's agent). The court, regarding the notice as apparently a demand on the vessel to take back the immigrant, held "we cannot, upon this evidence, deter-

mine what action the Secretary of Commerce and Labor took in this case."

It is submitted that the errors assigned as Nos. 19 and 20 should therefore be held well founded,—certainly error No. 19.

THIRD: The fine of $1000. in each case was grossly excessive and in contravention of Article VIII of the Constitution.

Here is a statute which on its criminal side allows a minimum fine of $200. and fixes a maximum of $1000. The whole reason for minimum and maximum punishments rests upon the legal theory that, considering the object to be accomplished and the fact that latitude should be allowed by which the court, in the exercise of a sound discretion and judgment, may temper the punishment to fit the particular case,—applying the maximum where the conceivably worst features of an offense are involved,—wilfulness, repeated offenses, aggravating circumstances, vicious or wicked intent, etc., on the one hand, and extenuating circumstances, etc., on the other hand.

There is no reason why the fine should be in a variable amount and the penalty in a fixed amount. The civil penalty cannot be assessed unless the first part of the section is violated, and if any reason should exist why the fine for the crime should be less than $1000. the same reason would exist for the civil penalty to be less than $1000.

Treated on the criminal side of this statute, it would be rank injustice, to the normal mind, to impose a $1000. fine in each case *on the facts* set up in the answer. A $200. fine would meet every demand of justice. No element is present requiring a reformative effect of punishment,—the very non-necessity of it being outstanding.

And on an "opinion" of the Secretary, sound or unsound, and which does not assume a consideration by him of the merits of the case itself, the whole range for gauging the fine to fit the circumstances of the case is swept away by the single specification of a $1000. fine against the vessel,—i.e., against its owner. Under the circumstances of this case a fine of $1000. on the criminal side of this statute would shock the sense of fairness in the ordinary man, and it loses nothing in this regard by being imposed on the civil side. In *McMahon* v. *State,* 97 N. W. 1035, 70 Neb. 722, it was held that a penalty so excessive as to shock the sense of mankind is unconstitutional on that ground.

It is further submitted that under the circumstances of this case the imposition of a total fine of $4000. was, by the fact of cumulation of the single fines, more distinctly violative of the inhibition against excessive fines. This case is different in principle from one where every day of continuance of an unlawful condition or failure of duty may fairly be treated as a separate offense, and different from a case where there were a series of separate acts each violative of law.

Here all of these four men escaped,—whether in a body at one time or separately at different times cannot be presumed, either way. Did the vessel's people "fail" in vigilance once, or four separate times?

Although we find that Section 10, before us, uses language on its criminal side to provide a penalty "in each case", we submit that this is not carried out on its civil remedy side, where the remedy and the penalty of $1000. on the vessel is a different one from that prescribed on the criminal side, and while we may conceive that one violative *act* might result in the simultaneous landing of more than one alien, we find, on the civil side, only a provision for a penalty and lien on

the vessel "whose owner, master, officer or agent *violates* the provisions of this section,"—a single penalty capable of being taken as applying to a one or more landings through one violative act. In other words, the vessel is responsible for one penalty of $1000. as an alternate to any number of prosecutions of the persons who individually or collectively were responsible for one common failure or shared in the failure; and we submit that where the failure was, as far as known, as well due to one act of failure (and if more than one the prosecution would have to prove it), there is no manifest intent that the word "violates", on the civil side of the section, has reference to anything more than a general failure on the criminal side. If more than one violative *act* or violative *condition* were shown, or a condition showing existence of an understanding by the "offender" that he was "landing" *four* men and yet *went ahead* with it, there might be four cases, although simultaneous, as in the case of *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, 58 L. Ed. 776, where there was an affirmative bringing in of several aliens simultaneously. Our case is rather like that of *United States* v. *N. Y. Central & H. R. Co.,* 232 Fed. 179, where but one penalty was attached because there was but one single act of solicitation (under the contract labor law) of alien immigration although several aliens responded on the strength of the one offer of employment,—although the statute said that "*for every violation* of the provisions of section four of this act, the persons, partnership, company or corporation *violating* the same by knowingly assisting, encouraging or soliciting the immigration or importation of *any* contract labor*er* into the United States shall forfeit and pay *for each such offense* the sum of one thousand dollars", and where the statute further expressly provided

that "separate suits may be brought for *each alien* thus promised labor or service of any kind". This case was affirmed in 239 Fed. 130.

And again, in the case of *United States* v. *International Silver Co.,* 255 Fed. 694, it was similarly held that but *one* penalty could be recovered where there was a single act of violation, following the case in 232 Fed. 179, supra.

To illustrate, suppose four aliens were being guarded by the vessel's officers and for this purpose detained in a room on the dock under lock and key, and that some member of the crew, say after serving meals to the men, should inadvertently fail to lock the door and left, supposing the latch had caught, while in fact it had not, and the men on discovering this had made their escape in a body. Would there be one "failure" to prevent their landing or four failures; and would there be one "violation" or four violations; every one of which would rest upon the single act of failure to see that the door latch was properly caught?

In the case of *Missouri K. N. & T. R. Co.* v. *United States,* 231 U. S. 112, 58 Law Ed. 144, the Court upheld the provision of separate fines for separate offenses in a case where a railroad had kept a whole train crew working more than sixteen consecutive hours contrary to the Service Act of March 4, 1907. The defense set up by the railroad was that the delay of the train was a single act although it had several consequences and that there was but one violation of the law for which but one penalty should be imposed. The Court held, however, that the delay may have made keeping the men over time more likely but was not wrong in itself that after the delay the railroad kept the men working over time and that this was an offense as to each man. and did not in itself constitute the offenses and in effect

In the case we are supposing the inadvertent failure to lock the door of the room would *itself* constitute *the* failure and hence the violation, nothing else contributing thereto.

In the case at bar we are left in uncertainty,—and the Court will not speculate,—as to how or when these four men got ashore, and whether by one failure or violation or for four failures or violations.

It has several times been held that the imposition of separate penalties, all growing out of one act or an act so comprehensive in its nature as to be inseparably connected is constitutionally excessive. For example, in the case of *Central of Georgia Railway Co.* v. *Railroad Commission of Alabama,* 161 Fed. 925, 962-3, the railroad company was charged with a large number of separate violations of the law prohibiting more than a stipulated rate for the carriage of merchandise, the penalty being provided for "each offense", and the Court observed that by the act the transportation of *every* pasesnger and *every* piece of freight was made a separate offense, in view of which the carrier would necessarily commit several thousand violations of the statute in a day's business for each of which it would be subject to a fine not exceeding $2000. and every employee knowingly engaged therein subject to a fine of not less than $100. nor more than $500. for each offense. The Railroad Commissioners fixed a penalty of $50. in view of which the Railroad could be fined over one million dollars a day. It was held that such an imposition of fines would "shock the conscience of an ordinary man" and the Court took occasion (see p. 979) to refer to a number of cases which united in declaring that if the amount of a fine will shock the conscience it is "excessive" in a Constitutional sense.

See the case of *Central of Georgia Ry. Co.* v. *Rail-*

road Commissioners of Alabama, 161 Fed. 925, at pages 978-979, as to when and why excessive fines are unconstitutional.

In *United States* v. *Oregon Short Line R. Co.,* 218 Fed. 868, where different shipments of cattle were received at different hours but all were together unloaded into an improper pen (for rest in transit), there was but one offense on account of the whole unloading into such a pen of all the shipments.

In the case of *Standard Oil Co.* v. *United States,* 164 Fed. 376, 385, it was held that there was but one act of transportation, contrary to law, although several carloads were carried and under separate way bills, and but one offense, assuming it had been made out.

In the case of *Baltimore & Ohio S. W. R. R. Co.* v. *United States,* 220 U. S. 94, 55 Law Ed. 384, the railroad was charged with violating the provisions of the act placing a twenty-eight hours limit on the time of confinement of live stock in transit without unloading. Eleven separate actions was brought by the United States against the Railroad to recover the penalty provided by the act because there were eleven shipments all on one train. The Court held that but one penalty could be recovered, notwithstanding the statute prescribed a penalty "for every such failure." Although shipments were made at different times, the Court held that there was but one failure to unload them all within the stipulated limit of time and that but one penalty could be imposed,—saying: "The simultaneous failure to unload these four cars was single, and punishable as a single offense. But the duty and offense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of one."

This livestock case, of failing to unload all livestock

on the one train although under separate shipments, is different from such a case as *Cotting* v. *Godard,* 183 U. S. 79, 46 L. Ed. 92 where the penalty was for charging more than a certain rate on livestock and was upheld as to each separate *shipment* (but the idea repudiated as applying to each animal) where a separate overcharge had been specifically made as to each shipment.

Our case is also different from:

United States v. *Carpenter,* 151 Fed. 214, where four separate forgeries were committed to accomplish successive steps in one theft;

State v. *Cotner,* 127 Pac. 1, 42 L. R. A. N. S. 768, where the statute prescribed a separate penalty for *each specific act* of practicing medicine without a license;

Journal Pub. Co. v. *Drake,* 199 Fed. 572, where the penalty was specifically for $1. *for every sheet* of copyrighted matter wrongfully held.

Separate impositions of the legal limit of a fine in a case of sixteen separate illicit sales of liquor would doubtless be warranted, but where a series of "separate" offenses all result from one single or continuing act or failure, it may be quite otherwise.

Whenever there is room for any question whether one penalty or several penalties may be imposed, the statute, being penal, will be construed as against more than one. See *People* v. *Spencer,* 201 N. Y. 105, Amer. Annot. Cases, 1912A, pages 818-820, and note collecting cases pro and con on pages 820-822. Also note on pages 228-229 of Amer. Annot. Cases 1916A.

In the case of *In re Maury,* 205 Fed. 626, 632, it is clearly intimated that a fine "out of proportion to the offense" would be excessive under the Constitution.

It should be conceived that maximum fines should be meted out to the worst offenders. In a case of an offense which rests upon a lack of vigilance, the imposition of a maximum fine where great vigilance *was* shown and the defendant was active in trying to fulfil the law, would take away all further incentive. The maximum imposition would moreover tend to defeat the very object of the law,—because excessive. If excessive in that degree, is it valid?

In the case of the *United States* v. *Steamship "Coamo"* in the United States District Court in and for the Southern District of New York, decided September 21, 1921, not yet reported, but of which a copy has been obtained, it was said by Judge Mack in an opinion given from the bench:

> "The Statute does not say that the Court shall impose a penalty, it says the penalty shall be a lien. In other words the point is not the amount, but it is the lien. The penalty shall be a lien and it is only if it is impracticable or inconvenient to prosecute. * * * Now in order to hold the vessel—and the report shows that that is the purpose of it—the lien is given on the ship. The lien for what? The lien for the penalty of a thousand dollars? In view of this being a part of the proceeding section, what does this mean? The imprisonment cannot be a lien. It is the money that is going to be the lien. Well, what money? A penalty. Construed absolutely literally a penalty of a thousand dollars would require a thousand dollars; but doesn't it mean a penalty up to a thousand dollars, giving the Court discretion as to the amount of the penalty? I think it does, and I will so hold, and I will levy a fine of $200. in each case."

We submit that the reasoning of this opinion should be followed in the case now before the court.

The assignment of errors Nos. 7 and 8 should be sustained.

FOURTH: The court had no jurisdiction to entertain this case as an alleged violation of Section 10 of the Immigration Act of February 5, 1917.

The Section 10 under which the Government proceeded in this case was passed by Congress as part of the Immigration Act of February 5, 1917. (Statutes at Large, Chap. 29, 212.) Sec. 38 thereof provides:

> "That this act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, except as provided in Section nineteen hereof . . ."

Section 19, referred to, relates to the deportation of aliens, and is not brought into this case in any way.

In the complaint and answer before the Court it is clearly brought out that the so-called aliens for whose landing the government seeks to recover a penalty are citizens of the Republic of China, and were Chinese persons. (Record, Pages 6, 9, 12, 15, 22, 23 and 24.) And it is also clearly shown that the "landing" of these Chinese persons was completed. (Record, Pages 7, 10, 13, 16, and 21.)

Section 4301 of the Compiled Statutes, 1916, which section is made a part of the Chinese Exclusion Act, provides, among other things, that:

> "The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power;"

By virtue of Sections 4335 and 4337 of the Compiled Statutes, 1916, the provisions of the Chinese Exclusion Act are expressly made applicable to the Territory of Hawaii; and there is no question but that the restrictions placed upon the admission of Chinese to the

United States apply to this Territory. (22 Op. Atty. Gen. 249.)

The Chinese Exclusion Act (Act of May 6, 1882, 22 Stat. L. 58) and its amendments, prohibits absolutely the immigration of Chinese laborers (Sec. 4290, Comp. St. 1916). Several classes of Chinese are, however, permitted to enter the United States by virtue of law and of the treaty of the United States with China.

But the Chinese Exclusion Act by its terms expressly prohibits *any* Chinese from entering the United States without a certificate from and permission of its government (Sec. 4293, Comp. St. 1916). This section embraces the following language:

> "Such certificate vised as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and *shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States;* but said certificate may be controverted and the facts therein stated disproved by the United States authorities."

Section 4295 of said Compiled Statutes, 1916, provides that the master of any vessel before landing or permitting to land any Chinese passengers shall deliver and report a complete list of all such passengers on board to the collector of customs.

Section 4296 of said Compiled Statutes, 1916, provides as follows:

> "Before any Chinese passengers are landed from any such vessel, the collector, or his deputy shall proceed to examine such *passengers,* comparing

the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law."

Section 4310 of the Compiled Statutes, 1916, provides:

"The master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer *or other Chinese person,* in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than five hundred dollars nor more than one thousand dollars, in the discretion of the court, for every Chinese laborer *or other Chinese person* so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court."

And Section 4297 of the Compiled Statutes, 1916, provides:

"Every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found."

So we find that in the present case if there had been any violation of the law in the landing of said Chinese persons it was a violation, not of Sec. 10 of the Act of February 5, 1917, but of the provisions of the Chinese Exclusion Act, and a violation for which the Chinese Exclusion Act provides specific penalties, both as to the master, etc., and against the vessel. And in this case the government is endeavoring to proceed under the general immigration laws when the act complained

of was a violation of a specific law applying to Chinese.

The courts have repeatedly held that it is a cardinal rule of the construction of statutes that specific legislation in regard to a particular class or subject is not affected by general legislation in regard to many classes or subjects, of which that covered by the specific legislation is one, unless it clearly appears that the general legislation is so repugnant to the special legislation that the legislators must be presumed to have intended thereby to modify or repeal it; the special and general legislation must stand together, the former as the law of a particular class or subject and the latter as the general law upon other subjects or classes within its terms.

Washington v. *Miller* (235 U. S. 422) 59 Law Ed. 295, 299.

Harris v. *Bell* (C. C. A. 8th Circuit) 250 Fed. 209, 216.

Anchor Oil Co. v. *Gray, et al.,* 257 Fed. 277, 283.

Frost v. *Werrie* (157 U. S. 46) 39 Law. Ed. 614.

U. S. v. *Healy* (160 U. S. 136, 137) 40 Law Ed. 369.

Townsend v. *Little* (109 U. S. 504, 512) 27 Law Ed. 1012.

Petrie v. *Creekman Lumber Co.* (199 U. S. 487, 496) 50 Law Ed. 281.

A question identical with that now presented was before the courts in the case of *Stoneberg* v. *Morgan,* 246 Fed. 98 (C. C. A. 8th Circuit). In the Stoneberg case the defendant was charged under the Immigration Act with unlawfully bringing in a Chinese person, an offense denounced by the Chinese Exclusion Act. The penalty under the Immigration Act was a possible fine

of $1000. and imprisonment for two years, and the penalty under the Chinese Exclusion Act was a possible fine of $1000. and imprisonment for one year. The Appellate Court held that the lower court had no jurisdiction to sentence the defendants under the Immigration Act. In so deciding the court followed the rule of law above set forth. It was held that where two pieces of legislation, one general and one special, made the same act a crime, the special legislation must be held to apply in the premises to the exclusion of the general legislation, and in support of the rule cited a large list of authorities.

The Supreme Court has taken up at various times cases involving Chinese, and the question of how far the general immigration laws apply to them, but it has never had before it a case on all fours with or similar to this one. In the recent case of *United States* v. *James Butt* (257 U. S. 38) 65 Law Ed. 119 (no brief being filed by defendant), it was held that a person attempting to bring in Chinese who *did not proceed far enough to violate* the terms of the Chinese Exclusion Act could be prosecuted under the terms of the Immigration Act. This holding is not adverse to our contention. In the case we are submitting there is a clear showing in the allegations of the libel that the Chinese were *landed,* and if landed it was unlawful under the provisions of the Exclusion Act (as well as under the provisions of the Immigration Act). The act complained of, if unlawful, was made so by the Exclusion Act.

It may easily be seen from the parts of the Exclusion Act that we have quoted that it contemplates and provides for the same procedure as the Immigration Act. All Chinese must present a certificate entitling them to enter the United States. Without such a certificate they are for the purposes of the Act automati-

cally classed as laborers and consequently as such are not permitted to land. The Chinese passengers on the ship are examined by the immigration officials, and those of the exempt class (which fact is evidenced solely by the certificate), are of course permitted to land. Inasmuch as the four Chinese that landed from the "Nanking" had no authority to land and were therefore unlawfully landed, they were, under the provisions of and for the purpose of the Exclusion Act, laborers, and if they landed their landing was a violation of that Act. This was clearly the intention of Congress, as no evidence other than the certificate was permissible to permit the Chinese to land. Thus we find a condition of affairs completely covered by the Exclusion Act, and under the rule of construction above set forth the court did not have jurisdiction to penalize the "Nanking" under the provisions of the general Immigration Act.

In view of these considerations it is submitted that the court had no jurisdiction to entertain this action under the Immigration Act, and the decision is void for that reason. Therefore the error assigned as No. 7 should be held well founded.

In conclusion: If the Chinese Exclusion Act is not controlling, and if the alternate fact constituting the condition for the civil suit does not have to be proved, then what strongly impresses us is that if any penalty at all is to be upheld in this case, on the facts offered by the claimant in defense, it will be against an "offender" innocent of intent to do a wrong, without knowledge of the "landing" of the men, guilty of no wrong, whose every effort (through its officers, agents, etc., of the vessel) was to uphold this very law by active measures,—but *penalized* notwithstanding. It is not within the ken of the ordinary mind to be pun-

ished for trying to do the right thing,—just as though he had wilfully done the wrong thing. Were this a criminal prosecution under this identical law, say against the master, on the same set of facts, he could actually be sent to prison for no reason except that he failed in his best efforts to keep the law. The supposition as to imprisonment is as good in law as the penalty on the civil side. *Can* this be *done,*—under our Constitution?

Section 10 of the Immigration Act may well have been constitutional as it stood before the word "negligent" was dropped out of it, *but,* we earnestly submit, *it isn't now.*

For the reasons presented, it is our belief that the decree appealed from should be set aside.

Respectfully submitted,

SMITH, WARREN, STANLEY & VITOUSEK,

L. J. WARREN,

R. A. VITOUSEK.